United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

THOMAS R. MARTIN, *Appellant*, *vs.* THE DISTRICT OF COLUMBIA.	}	No. 14 Special.

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BRIEF OF APPELLANT.

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STATEMENTS OF FACTS.

This case comes before the court on appeal from the judgment of the Court below, sustaining the respondents motion to quash the writ of certiorari issued herein, and dismissing the petition.

The petition shows that on March 4th, 1896, Clarence A. Brandenburg, being the owner in fee of sublots 42 and 43 in Square 69 in the City of Washington, the same abutting 20.43 and 20 feet respectively on an alley running East and West in said square, and running back by the same width to a depth of 75 feet, conveyed the same to Job Barnard and James S. Edwards, as trustees upon the usual terms, to secure the payment to Florence E. Edwards, guardian, of a certain promissory note of said Brandenburg and the renewals thereof, for the sum of $1,000, with interest, the same bearing date the 4th day of March, 1896, and payable to the order of said Florence E. Edwards, guardian, three years after said date, with interest, and that said deed of trust was on the same day duly recorded among the land records of the District of Columbia. That at the time the proceedings for the opening of a street as hereinafter stated were had, said

Florence E. Edwards was the owner and holder, in good faith, for value, of the note mentioned, which note has been from time to time renewed and is now held by the petitioner, who acquired the same in good faith, in due course, from the said Florence E. Edwards, guardian, and for value and that the same has never been paid nor any part thereof.

The petition further avers that pursuant to the provisions of the act of Congress approved July 22, 1892, and the amendment thereof, authorizing the opening and extending of alleys and minor streets, the Commissioners of the District of Columbia, upon the request of the supposed owners of more than one-half of the land in said square, in February, 1898, made an application in writing to the Marshal to summon a jury to condemn the land necessary for the opening of a minor street in said square, to be known as Newport Place, by the widening of the thirty foot alley referred to, to a width of sixty feet and the extension of the same by that width through the square from 21st to 22nd streets. Pursuant to such request, a jury so impaneled, and presided over by the Marshal's deputy, and not under the direction or control of any judicial tribunal, on March 17, 1898, made its award and finding whereby they undertook to condemn for the purposes of said street a part of said sublots 42 and 43 covered by the deed of trust aforesaid, that is to say, 40 feet, 3 inches, the width thereof, fronting upon said proposed street, by a depth of 15 feet, or one-fifth of the total area of said lots, and at the same time undertook to allow as the value of the land so taken, at the rate of 25 cents per square foot, the sum of $92 for the part taken of sublot 42 and $75 as the value of the part of sublot 43 taken, but these amounts were never paid to the owner nor to the petitioner, to be credited upon the notes secured thereon, but the jury deducted the same from the total amount of the tax or charge apportioned against the residue of said lots, presumably as benefits. The jury, pursuant to the requirements of

the law, undertook to apportion the total amount of damages awarded for the land condemned, together with the costs of the proceedings, against the lots in said square, and of this amount, they charged against the residue of said sublot 42, having a remaining depth of 60 feet only, the sum of $650, less the sum of $92 allowed as the value of the part of said lot taken and against said sublot 43 the sum of $550, less the sum of $75 allowed as the value of the part of said sublot taken.

Pursuant to the finding of this jury, the assessor of the District undertook to levy against the residue of said sublots the amounts so fixed by the jury, which, together with liberal interest, remain as charges against said lots, and because of nonpayment, the Collector has notified the owner of his purpose to sell the same. And the Collector has also levied taxes for water, sewer, paving, grading and curbing.

Immediately after the return was filed the owner of the property instituted proceedings in this court to quash said assessment for the opening of said street alleging the unconstitutionalty of the act of Congress under which the proceedings were taken, and the invalidity of the tax, if the act be valid, because of the failure to observe the requirements of law in its assessment, and this proceeding is still pending.

The petition in this case further alleges that no notice whatever, either by publication or personal service, was given to the trustees under the deed of trust or the owner and holder of the note secured thereby upon the lots in question; and further, that, without notice, there has been taken away one-fifth of the land theretofore securing the said note, and appropriated to public uses, and interposed between the land and note held by the petitioner, a tax amounting to $1,200; that is to say, as a result of the proceedings, instead of having a first lien upon two lots 20 feet by 75 feet deep each, the note is secured upon two lots only 20

feet front by 60 feet deep each, and these lots are subject to the previous lien of a special tax for $1,200.

The petition further alleges that the value of the land taken, as fixed by the jury, was 25 cents per square foot, while the amount of the assessment apportioned against the same was twice as much, to wit, 50 cents per square foot, and the petitioner expressly charges that said assessment is more than 50 per cent. in excess of the actual benefits, and in itself, was, at the time of the levy thereof, and still is in itself in excess of the value of the land in said lots, notwithstanding the opening of said street, whereby the security of said note, without notice, has been wholly destroyed.

The petition alleges that the Act of Congress under which these proceedings were had is unconstitutional because it authorized the taking of property without due process of law and without just compensation, and further, assuming the validity of the law, that the tax itself is invalid because of the failure to give notice and because of the various other grounds specifically mentioned in the petition.

A writ of certiorari was duly issued upon the filing of the petition. No return was filed, but instead, the respondent filed a motion to quash the writ on two grounds, first, because the petitioner is not the owner of the property described in the petition, but is simply the holder of a promissory note secured by deed of trust thereon; and secondly, that the owner of the property has heretofore brought suit to set aside the same assessments against the same property.

ASSIGNMENT OF ERROR.

The court below erred in granting the motion to quash the writ of certiorari and in dismissing the petition.

BRIEF.

The facts set up in the petition are, for the purposes of this hearing, conceded to be true. The question is whether

they authorize the petitioner to question the validity of the assessments complained of.

We do not consider that the second ground assigned for quashing the writ in this case, calls for any particular consideration. The question sought to be raised—that is, the pendency of a different suit by a different person, though having the same object, cannot be raised on a motion to quash in this manner. In the second place, if the petitioner has any interest in the property and any right to question the validity of the tax complained of, the fact that some one else, having a totally different right, is seeking to maintain a suit to protect that right, cannot affect or impair the right of the petitioner to question the tax so far as it affects him. There may be any number of suits, brought for identically the same purpose, by different people, having different interests, whose interests are differently affected. How a citizen can be deprived of his right to maintain a suit to protect his interests because some one else has seen fit to sue for the same reason is too difficult a problem for us and we are compelled to pass the matter without further comment.

The real question, and as we believe, the only question raised by this motion, is whether the petitioner, as the holder of a note secured upon the lots described, has such an interest therein that he may question in this proceeding the validity of the special assessment for opening Newport Place.

As shown, no notice whatever was given to the holder of the note or the trustees under the trust securing the same, whether by publication or by personal notice. There was in this case no notice by publication of any character.

This note and the trust securing the same were outstanding at the time the proceedings for the opening of the street were had. One fifth of the area of land covered by the trust has actually been taken and appropriated to public

uses, and a tax of $1,200, twice the value of the land as fixed by the jury itself, has been interposed between the security for the note and the land itself. The amount allowed by the jury for the land thus taken was not paid to the petitioner or applied as a credit on the note, nor was it paid to the owner of the property, but was deducted from the amount of tax assessed against the residue of the lots. The question then is, can the government take away the security of the petitioner without notice. The mere statement of the situation seems to carry the answer.

It is undoubtedly the law that notice must be given before a special assessment can become a valid charge against property. The question is rather, whether the petitioner is one of the persons legally entitled to notice.

In Allman *vs.* District of Columbia, 3 App. D. C. 20, the Court of Appeals said:

> "Seasonable notice at some serviceable stage of the proceedings is absolutely necessary to the validity of an assessment."

To the same effect are:

> Paulsen *vs.* Portland, 149 U. S. 30.
> San Mateo *vs.* S. P. R. R., 13 Fed. 722, and others.

The Constitution provides that private "property" shall not be taken for public use without just compensation, nor shall any person be deprived of his "property" without due process of law. No doubt it was because of this requirement that the Marshal undertook to give a notice, though imperfect, to the owner of the property. It was given because he had a "property" interest in the land condemned, and the land assessed, and not because of the extent or value of such interest; that is to say, he was given notice because he had an interest therein, recognized by law, that could be affected by the proceedings. How much more so then, was the holder of the note secured by the

trust and the trustees in such trust entitled to notice? The interest of the holder of the note was not only substantial and valuable, but it was a legal interest, recognized by law, and one that could not, in any proceeding or in any manner, by the government or by private individuals, be displaced, without notice and without the consent of such holder, except in the exercise of the right of eminent domain, in which event, in addition to notice, such holder became entitled to compensation to the extent his interests were affected. The real test as to who shall receive notice is whether the "property" of the person will be "affected" by the proceeding, and if so, notice is essential, and if this "property" is taken or damaged or its value impaired, the holder of such "property" interest is entitled to compensation. The word "property" as used in the Constitution is not limited to real property. The word "property" is *nomen generalissimum* and extends to every valuable right and interest, including real and personal property, easements, franchises, incorporeal hereditaments; in fact, everything that is the subject of ownership.

Am. & Eng. Ency. Vol. 23, p. 262 and cases cited.

This being so, specifically, is the interest of the holder of a note secured by deed of trust, an interest in "property?" A mere lien upon real estate is included in the term.

Old Colony etc. *vs.* Plymouth, 14 Gray, 161.

A mortgage is property.

Wilson *vs.* Ward, 67 Fed. Rep. 677.
Horton *vs.* McKee, 68 Fed. Rep. 404.
People *vs.* Eddy, 43 Cal. 331.
Stebbins *vs.* Stebbins, 86 Mich. 481.
Aggs *vs.* Shackelford, 85 Tex. 145.

So are all equitable titles.

Gray *vs.* Central Mass. R. R., 171 Mass. 116.

Choses in action are property.

Jenkins *vs.* International Bank, 106 U. S. 571.

Was therefore the "property" of the holder of the note in this case affected or in fact, partly taken? It is obvious from the facts in this case that the property of the holder of the note was much more affected than the property of the owner of the equitable title merely. We call attention of the court to the fact that this case involves two elements, one, the question arising out of the taking of the property, and secondly, the imposition of an assessment for special improvements. Cases frequently arise where lots abutting upon a proposed street are assessed for benefits, and these lots, at the time of assessment, are subject to deeds of trust or mortgages. But this case goes a step beyond. Part of the land conveyed by the trust and covered thereby was actually taken, and the compensation allowed for the part thus taken, instead of being paid to the holder of the note, was applied as a credit on the amount of the assessment against the residue of the lots. As a result of this proceeding therefore, we have one-fifth of the property covered by the trust actually taken, and against the residue of the land securing the note, a special tax amounting to $1,200 interposed between the land and the security for the notes. And, the amount of the assessment in itself being twice the value of the land, the result is, as averred in the petition, that the security for the note has been absolutely destroyed without compensation and without any notice whatever to the holder of the note.

It may be suggested that a deed of trust may be likened to the lien of a judgment which some authorities seem to hold need not be recognized in paying for condemned land, and not long since the Commissioners were advised they might pay over to the "owner" the value of land condemned without regard to the lien of a judgment of which the

authorities had notice. If that is the law, it needs revision. But there is a wide difference between the lien of a judgement, created by law and which may in like manner be withdrawn without compensation, and the lien of the holder of a note secured by an absolute conveyance of the legal title to the property. And it is not even the case of a mortgage which in some jurisdictions is regarded merely as security for a debt, the conveyance by way of mortgage being accompanied by a defeazance of title. A deed of trust is now, and always has been, an absolute conveyance of the legal title, which can only be revested in the grantor by a formal conveyance by way of release from the trustees named in the trust, with the consent of the holder of the note secured thereby. Mere payment itself does not revest title.

In the United States vs. Commonwealth Title Co., 193 U. S. 651, the Supreme Court, in considering the nature of a mortgage, said:

> "A brief definition of a mortgage under modern law is not easy to make. At common law a mortgage was a conditional conveyance to secure the payment of money or the performance of some act, to be void on such payment or performance. By more modern law and under the statutes of many states a mortgage is a mere lien upon land. Its dominant attribute is security, but nevertheless it must be regarded as 'both a lien in equity and a conveyance at law.' Pom. Eq. Jur. Sec. 1191. The interest of a mortgagee in the land is, therefore, conveyed to him by the mortgagor, and even if, under the laws of Montana, a mortgage is primarily a security for a debt, and creates a lien only, it is a lien which may become the title. The decree of the court conveying the title is, of course, the act of the law consummating the act of the mortgagor. And the sale and deed relate to the date of the mortgage, conveying the title which was then possessed by the mortgagee."

The deed of trust in common use in the District is much more than a mortgage, and abolutely carries at law, the title of the grantor. If he conveys thereafter, he conveys his equity merely, not the legal title. The legal title is outstanding in the trustees under the trust. And this title is a fee though not an absolute fee. Is then the owner of a fee title (though qualified, in whom is vested, as stated by the Supreme Court, the "interest of the mortgagor," entitled to notice when his property is actually taken? The Code of the District, declaratory of the law as it previously existed, in Section 522, provides:

> "The legal estate conveyed to a mortgagee, his heirs and assigns, or to a trustee to secure a debt, his heirs and assigns, shall be construed and held to be a qualified fee simple, determinable upon the release of the mortgage or deed of trust, as hereinafter provided; or the appointment of a new trustee by judicial decree for the causes hereinafter mentioned; provided, that nothing in this section contained shall prevent the passing of an absolute and unqualified estate in fee simple under a deed made by the mortgagee or trustee in pursuance of the powers conferred by the mortgage or deed of trust."

We wish to refer briefly to some authorities bearing upon the question of notice in condemnation proceedings, And first,

As Between Mortgagor and Mortgagee.

It seems to be universally admitted that a mortgagee of land taken for public use under eminent domain proceedings has some rights which a court will protect though there is some diversity of opinion as to the precise extent of those rights and as to the proper means for protecting them. As between mortgagor and mortgagee the general rule is that the award takes the place of the land appor-

priated under the rule that when the land is turned into money the mortgage becomes a lien upon the funds instead of the land.

Astor *vs.* Miller, 2 Paige 68.

Consequently it has been held under a road proceeding the court will not award the damages assessed to the owner of the soil without first inquiring whether or not there are incumbrances, and if there are, an equitable distribution of the funds will be made.

Re Noble est., 1 Ashm. 276.

The jury should apportion the damages between the owners of the land and those having interests as mortgagees, liens or otherwise.

Rentz *vs.* Detroit, 48 Mich. 547.

If the mortgagee seeks to appropriate the fund, it must be paid to him although he was not made a party to the condemnation proceedings.

Bright *vs.* Platt, 32 N. J. Eq. 370.
Union Mut. L. I. Co. *vs.* Slee, 123 Ill. 95.
Dodge *vs.* Omaha & S. W. R. 20 Nebr. 281.
Chicago etc. *vs.* Baker, 102 Mo. 560.

Where an award is made for land taken for a street and an assessment made on the remaining land for benefits, the award may be allotted to the mortgagee without deduction of the assessment and a decree rendered for foreclosure of the remaining property specifiying the unpaid balance of the mortgage.

Hooker *vs.* Martin, 10 Hun., 302.

But in this case, we wish to emphasize the fact, that the amount allowed as compensation for the land taken, was neither paid to the owner nor to the holder of the note, but

was credited upon the assessment against the residue of the land. This contravenes every principal of law.

As Between Mortgagee and Appropriator.

While there is a difference of opinion among the courts as to the steps necessary for an appropriator of private lands to take in order to protect himself, the authorities generally require notice and that view seems to be the one that accords with common sense and natural justice.

A railroad company cannot obtain by proceedings under a statute greater rights than it can acquire as an innocent purchaser for value from the mortgagor.

Severin *vs.* Cole, 38 Iowa, 467.
Wooster *vs.* Sugar R. Co., 57 Wis., 312.

The taking authority must provide for the satisfaction of the mortgage.

Devlin *vs.* New York, 131 N. Y., 127.

HOW FAR A MORTGAGEE MUST BE MADE A PARTY AND GIVEN NOTICE.

Expressions are found as broad as that the term "owner" includes every one having any title or interest in the land.

Balto & O. R. R. *vs.* Thompson, 10 Md., 87.

The numerical weight of the cases in which the question has been passed upon recognizes the right of the mortgagee to notice and in many cases in which no opinion has been expressed on the point there seems to be an assumption that notice as to him was necessary.

In Simon *vs.* Rhoades, 24 Minn. 25, the court said the interest of the mortgagee could have been bound by making him a party to the proceedings.

The requirement of notice to all parties in interest in the land to be taken, includes the mortgagee.

Warwik *vs.* Providence, 12 R. I., 144.
State & E. & A. R. Co., 36 N. J. L., 184.

Under a charter requiring notice to persons interested, if the mortagee is not notified he will not be bound by the proceedings.

Platt *vs.* Bright, 29 N. J. Eq., 128.
Re N. Y. Central Co., 20 Barb., 419.

The same rule has been applied when the statue provides for notice to the "owner." The term "owner" is to be regarded as descriptive of the persons equitably entitled to receive compensation for damage rather than as designating the persons having a legal title to the land, and between the mortgagor and the mortgagee, the latter is entitled to the fund.

Danforth *vs.* Suydam, 4 N. Y., 68.
Parks *vs.* Boston, 15 Pick., 203.

A mortgagee is the owner in such a sense that he is entitled to notice of the assessment of damages for a right of way over the mortgaged property.

Severin *vs.* Cole, 38 Iowa, 467.

It is only by treating the mortgagee as having a right to notice that the statute can be upheld. Payment of the award to the mortgagor without notice to the mortgagee will not protect a corporation from being held liable to pay it to the mortgagee.

Sherwood *vs.* Lafayette, 109 Ind., 411.

The condemnation of property upon which there is a mortgage of record, without notice to the mortgagee and without his knowledge, will not affect his rights in the premises. The mortgagee's rights are protected by the constitutional provision that property shall not be taken for public use without compensation.

Dodge *vs.* Omaha & S. R., 20 Neb., 281.

A mortgagee out of possession, whose mortgage is recorded, should be made a party to the proceedings of condemnation of the mortgaged property.

Wilson *vs.* European & N. Co., 67 Me., 358.

If the mortgagee is not made a party to the proceedings, he will not be bound by the award.

Calumet River Co. *vs.* Brown, 12 L. R. A. (Ill.), 84.
Bright *vs.* Pratt, 32 N. J. Eq., 370.
Wade *vs.* Hennessy, 32, 55 Vt., 210.

Mortgagees are necessary parties to a suit to recover damages for the taking of property.

Davis *vs.* LacCrosse, 12 Wis., 16.

Under the English statues a mortgagee must be made a party and his rights provided for.

Rankin *vs.* East I. & W. Co., 12 Beav., 304.
Martin *vs.* London, L. R. I. Eq., 145.

It is certainly the rule that notice must be given in jurisdictions where the common law doctrine relating to mortgages prevails, where the mortgagee is held to be the possessor of a defeasible title to the land.

In Mills on Em. Domain, Ed. 1888, Sec. 103, he says:

> "It has sometimes been doubted whether a mortgagee not in possession is entitled to notice. The better doctrine is that a mortgagee, whose mortgage is recorded, is entitled to notice although not in possession. The condemning party must see that a mortgagee is somehow paid or satisfied for the land taken so far as covered by the mortgage. Without notice, a mortgagee might lose his entire security by proceedings carried on without his knowledge or consent."

The lien of a judgment is different and a mere creature of legislation. As there can be no vested right in a remedy.

Watkins *vs.* R. R., 47 N. Y., 157.

Lewis on Eminent Domain, Sec. 324, 2nd Edd., says:

> "On the question whether mortgagees are necessary parties to condemnation proceedings, the authorities are not only conflicting but very unsatisfactory. The cases go almost entirely upon the language of the statutes as though it was a matter entirely within the control of the legislature. It seems to us that a mortgagee stands upon a higher ground, his interest in the land and the rights secured to him by his mortgage are property which cannot be taken away from him without notice and an opportunity to be heard. Where a right of way is taken through a farm it may be a matter of slight consequence. But when an entire tract is taken which is mortgaged for all its worth and the compensation handed over to an insolvent mortgagor, it becomes a very serious matter. This looks very much like depriving a man of his property without compensation and without due process of law. All the courts agree that a mortgagee in possession must have notice. Those courts which hold that the mortgagee is divested without making the mortgagee a party, also hold that the mortgage lien in equity follows the fund which is a substitute for the land and that the mortgagee may have it applied upon the mortgage debt. * * * A statute which requires all persons having any interest in lands to be made parties has been held to include mortgagees even in states which hold that mortgagees are not entitled to notice as owners."

It seems to us this review of the authorities correctly states the law. We firmly believe no case can be found, even in states where they hold that notice to mortgagees is not required, that do not require notice when the proceeds of the land condemned are not put in place of the mortgaged land taken and applied as a credit upon the mortgage debt. In this case it was applied as a credit upon the assessment

against the residue of the land without paying the slightest regard to the outstanding deed of trust.

So we claim that the interest of the holder of the note secured upon this property was such that he was entitled to notice, and that if the statute itself is not considered as broad enough to require notice, it is itself invalid; and if it be considered as broad enough to require notice, then the proceeding is invalid, because the requirements of law were not met and notice was not given.

The law under consideration requires that notice shall be given to the "proprietor" of the property taken. This term is synonomous with the word "owner" and the same rule applies.

Am. & Eng. Enc., Vol. 23, p. 267.

If it be considered that this term does not include mortgagees or the holders of notes secured by deeds of trust, then it is invalid for the reasons stated.

As suggested by Mr. Mills in the quotation just made from his text book, in those states where it has been held that no notice need be given the mortgagee, they have treated it merely as a matter of construction of the statutes under which they were proceeding. But something else is required. Notice is essential, and if by any proper construction, the law itself fails to provide for notice, it is invalid; and if held to require notice, then this proceeding is invalid because no notice was given.

We therefore submit that the petitioner is entitled to question the validity of the taxes assessed against the lots covered by his trust and that the motion to quash should have been overruled and the respondent required to answer.

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